No. 14-114

IN THE

Supreme Court of the United States

DAVID KING, *ET AL.*, *Petitioners*,

v.

SYLVIA BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES, *ET AL.*, *Respondents*.

On Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

Brief *Amicus Curiae* of Virginia State Delegates Mark Berg, Bob Marshall, and David LaRock, Virginia State Senator Dick Black, U.S. Justice Foundation, Lincoln Institute for Research and Education, Abraham Lincoln Foundation, Institute on the Constitution, Conservative Legal Defense and Education Fund, and Policy Analysis Center in Support of Petitioners

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INTEREST OF THE *AMICI CURIAE*[1]

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[1] It is hereby certified that counsel for the parties have consented to the filing of this brief; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

[2] https://leg1.state.va.us/cgi-bin/legp504.exe?101+ful+CHAP0818.

the fight to block Medicaid expansion during the Special Session of the Virginia legislature.

U.S. Justice Foundation, The Lincoln Institute for Research and Education, Conservative Legal Defense and Education Fund, and Policy Analysis Center are nonprofit educational organizations, exempt from federal income tax under Internal Revenue Code ("IRC") section 501(c)(3). The Abraham Lincoln Foundation for Public Policy Research, Inc. is a nonprofit social welfare organizations, exempt from federal income tax under IRC section 501(c)(4). Institute on the Constitution is an educational organization.

These organizations were established, *inter alia*, for educational purposes related to participation in the public policy process, which purposes include programs to conduct research and to inform and educate the public on important issues of national concern, the construction of state and federal constitutions and statutes related to the rights of citizens, and questions related to human and civil rights secured by law. Each organization has filed many *amicus curiae* briefs in this and other courts.

Some of these *amici* have filed *amicus curiae* briefs in the following recent cases challenging the Affordable Care Act, including three filed in this Court:

- Virginia, *ex rel.* Kenneth T. Cuccinelli, II, Attorney General of Virginia v. Kathleen Sebelius, 656 F.3d 253 (4th Cir. 2011).[3]

- Virginia, *ex rel.* Kenneth T. Cuccinelli, II, Attorney General of Virginia v. Kathleen Sebelius, No. 11-420, On Petition for *Certiorari* (Nov. 3, 2011).[4]

- Dept. of Health and Human Services v. Florida (consolidated with NFIB v. Sebelius, 567 U.S. __, 132 S.Ct. 2566 (2012).[5]

- Conestoga Wood Specialties v. Sebelius, 573 U.S. ___, 134 S.Ct. 2751 (2014).[6]

STATEMENT

The history of the Patient Protection and Affordable Care Act[7] ("ACA") is, to put it bluntly, a history of lawlessness. Shamelessly hatched "behind closed doors," political deal-makers inside the

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[3] http://www.lawandfreedom.com/site/health/VA_v_Sebelius_Amicus.pdf.

[4] http://www.lawandfreedom.com/site/health/VA_v_Sebelius_Amicus_SC.pdf.

[5] http://www.lawandfreedom.com/site/health/DHHSvFlorida_Amicus.pdf.

[6] http://www.lawandfreedom.com/site/constitutional/Conestoga%20Wood%20Amicus%20Brief.pdf.

[7] Pub. L. No. 111-148, 124 Stat. 119 (Mar. 23, 2010).

legislative and executive branches "rammed [ACA] through Congress in record time." *See* Petitioners Reply to Brief in Opposition at 11. When finally exposed to light, there could be no mistake, "the passage of Obamacare ... relied on ... bribery ... to gain the necessary votes" in the Senate of the United States (B. Shapiro, "Lawless: Obamacare and the Imperial Government"[8]):

> The bill originally included the so-called **Cornhusker Kickback** ... to earn the vote of Sen. Ben Nelson (D-NE).... Similarly, Sen. Bill Nelson (D-FL) originally handed over his Obamacare vote in return for avoiding cuts to Medicare Advantage in Florida ... — the so-called **Gator-Aid payoff**. Then there was the **Louisiana Purchase** in which Sen. Mary Landrieu (D-LA) effectively sold her Obamacare vote in return for $4.3 billion in Medicaid funds...." [*Id.* (emphasis added).]

Equally hidden from view, unelected elites, including the now infamous MIT economist Jonathan Gruber,[9] assisted in an effort to make ACA "deliberately obscure and deceptive ... in order to get it

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[8] http://goo.gl/1iQO9Q.

[9] "Touted by press and politicians alike as an objective and fair-minded arbiter of health-care reform, the MIT economist was in fact a warrior for the cause, invested emotionally, politically and, as it turns out, financially through undisclosed consulting arrangements. *See* J. Goldberg, "The Real Person of the Year," National Review (Dec. 17, 2014) http://www.nationalreview.com/node/394824/print.

passed." *See* C. Krauthammer, "The Gruber Confession," *The Washington Post* (Nov. 13, 2014).[10] "Lack of transparency," Professor Gruber bragged, "is a huge political advantage," not only to fool the "stupid[] American voter," but also to manipulate the nonpartisan Congressional Budget Office ("CBO") into scoring ACA's controversial individual mandate as not a "tax" (*id.*), thereby ensuring ACA's passage. *See* G. Kessler, "Explainer: What Gruber meant when he said 'if CBO scored the mandate as taxes, the bill dies,'" *The Washington Post* (Nov. 19, 2014).[11]

While Professor Gruber has since backed off his claim to be ACA's "architect," former House Speaker Nancy Pelosi has never retracted her revealing assertion as to how poorly the bill was understood by her colleagues in March of 2010 that "[w]e have to pass the bill so that you can find out what is in it."[12] Instead, the former Speaker is still defending the "legislative process"[13] whereby a 2,700-plus-page bill

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[10] http://goo.gl/uKmCoS.

[11] http://goo.gl/j2vItR.

[12] E. Johnsen, "Pelosi: Of course I stand by my 'we have to pass it so you can find out what's in it' remark," Hot Air (Nov. 18, 2013), http://goo.gl/sEbyVa.

[13] "Obamacare ... quickly passed [the House] without anyone reading the final bill.... And Senate Majority Leader Harry Reid (D-NV) rammed through a vote on Obamacare just before Christmas 2009 to avoid blowback from the American people when Senators went home for the holidays. Both Pelosi and Reid used myriad procedural conjurings in order to pass the bill." *See* B. Shapiro, "Lawless: Obamacare and the Imperial Government,"

was squeezed through the Senate, rammed through the House, and ceremoniously signed by the President:

> [I]t took a great deal for us to pass this bill. I said if we go up to the gate and the gate is locked, we'll unlock the gate. If we can't do that, we'll climb the fence. If the fence is too high, we'll pole vault in. If we can't do that, we'll helicopter in, but we'll get it done. [*Id.*]

Introduced in the House, the ACA began as H.R. 3590,[14] the "Service Members Home Ownership Tax Act of 2009." The six-page bill stated its modest purpose: to "modify the first-time homebuyers credit in the case of members of the Armed Forces and certain other Federal employees...." Passed unanimously by the House, the Bill was forwarded to the Senate where Senator Harry Reid ripped away all of its six pages, and replaced them with a bill 450 times its original length under the brand new name of "Patient Protection and Affordable Care Act." On Christmas Eve, December 24, 2009, ACA was passed by the Democrat-controlled Senate.[15]

Having shirked their solemn duty as legislators to know the contents of a bill before voting for it, members of Congress should not have been surprised

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Breitbart (Feb. 11, 2014), http://goo.gl/1iQO9Q.

[14] https://www.congress.gov/bill/111th-congress/house-bill/3590.

[15] http://www.congress.gov/111/bills/hr3590/BILLS-111hr3590eas.pdf.

by what has ensued. The Galen Institute reported that, by 2014, "more than 42 significant changes already have been made ... at least 24 [of which] President Obama has made unilaterally...." T. Hartsfield and G-M. Turner, "42 Changes to ObamaCare ... So Far" (Nov. 6, 2014).[16] In the last year of this cascade of changes, the Obama Administration announced that the employer mandate compliance deadline was extended a second time, from 2015 to 2016. This announcement triggered reactions from across the political spectrum. *The Wall Street Journal*, a long-time opponent of ACA, editorialized:

> "ObamaCare" is useful shorthand for the Affordable Care Act not least because the law **increasingly means whatever President Obama says it does on any given day**. His latest lawless rewrite arrived on Monday as the White House decided to delay the law's employer mandate for another year and in some cases maybe forever. ["Obama Rewrites ObamaCare," *The Wall Street Journal* (Feb. 10, 2014) (emphasis added).[17]]

A long-time supporter of the ACA, *The Washington Post* has also slammed the President for his "increasingly cavalier approach to picking and

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[16] http://www.galen.org/newsletters/changes-to-obamacare-so-far/.

[17] http://goo.gl/Xbs0Iv.

choosing how to enforce this law."[18] Another champion of ACA, National Journal Editorial Director Ron Fournier, headlined a biting editorial "Why I'm Getting Sick of Defending Obamacare"[19] that stated:

> Not coincidentally, the delays punt implementation beyond congressional elections in November, which raises the first problem with defending Obamacare: The **White House has politicized its signature policy**. [*Id.* (emphasis added).]

Upon hearing of the latest ACA "waiver," longtime critic Charles Krauthammer observed:

> This is stuff that you do in a banana republic. It's as if the law is simply a blackboard on which Obama writes any number he wants, any delay he wants....[20] [*Id.*]

Utah Senator Mike Lee framed the issue as one of separation of powers:

> At some point the President of the United States has to recognize that we are a nation that operates under a system of laws. He is

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[18] "The Obama administration has a mandate on the health-care law, too," *The Washington Post* (Feb. 11, 2014), http://goo.gl/TLp5gg.

[19] http://goo.gl/MHL8FP.

[20] http://goo.gl/y4s2Ha.

> not an emperor. He is not a super-legislature. And he doesn't have the power to just trump what Congress does. ["Mike Lee: Latest Obamacare delay is 'lawless' — 'he is not an emperor,'" *Washington Examiner* (Feb. 10, 2014).[21]]

Although the President has maintained that he is simply exercising his discretion pursuant to his constitutional obligation to "take care that the laws be faithfully executed," this duty does not "impl[y] a power to forbid their execution." *See* Kendall v. United States ex rel Stokes, 37 U.S. (11 Peters) 524, 612-13 (1838). Indeed, the President's expansive interpretation of his power to faithfully execute the law "would be vesting in the President a dispensing power, which has no countenance for its support in any part of the constitution; and is asserting a principle, which ... would be clothing the President with a power entirely to control the legislation of congress, and paralyze the administration of justice." *Id.*

Against this highly politicized backdrop, this case presents the question of not only whether one more provision of ACA may be unilaterally waived, but also whether a new provision for subsidies to a broad new class of taxpayers can be read into the statute. The rationale for the regulation is simple: the ACA statute — as written by Congress — is at odds with what the President now wants.

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[21] http://goo.gl/306lqP.

SUMMARY OF ARGUMENT

The Government views this case as a matter of statutory construction — whether federal tax subsidies for health insurance coverage apply only to those persons who purchase insurance through an "Exchange established by the State" under section 1311 of the ACA. In truth, the statute being so clear, the question really is: Shall the statutory text be applied, or instead disregarded to conform to the policy wishes of the Executive Branch?

This question has not reached the Court in a political and constitutional vacuum. Birthed and enacted into law by a process of political intrigue and deception, the Obama Administration has adopted a lawless strategy of ACA implementation, unilaterally waiving or delaying various statutory requirements under the guise of presidential discretion. Contrary to his claim of discretion under his constitutional duty to take care that the law be faithfully executed, the President has instead exercised an unconstitutional prerogative power, dispensing with explicit, congressionally imposed deadlines, in violation of the separation of powers principles and ministerial practices contemplated by the Constitution.

The Government claims that the President — under the rulemaking powers of the Internal Revenue Service — may dispense with the clearly established statutory rule that tax subsidies are available only to persons who purchase health insurance in an Exchange established by a State. This is an unconstitutional usurpation of the legislative powers

vested by the Constitution solely in Congress. To reach this result, the Government urges this Court to ignore well-established rules of statutory construction. This would be rule by bureaucratic fiat, not rule by law.

Driven by politics, the Obama Administration has adopted a strategy to save ACA from further congressional scrutiny, by reading the ACA to reflect a presidential policy, governed by congressionally established means. The Government seeks to short-circuit this constitutional process in order to save ACA from any change by Congress, whose membership is very different from the Congress that barely passed the ACA just five years ago.

If the rule of law is to mean anything, this Court must not sanction policies promulgated by an unelected bureaucracy — like the IRS — in direct contradiction of the written text of a duly enacted statute. The ACA provision in question should be interpreted according to the plain meaning of the statutory text, rather than according to the Humpty-Dumpty approach — "words mean what I want them to mean" — urged by the Government.

ARGUMENT

I. THE IRS REGULATION IS OUTSIDE ANY POWER VESTED BY THE CONSTITUTION IN THE PRESIDENT.

A. Unpopular and Unworkable, ACA Has Survived Only by the Obama Administration's Grant of a Series of Waivers.

In ACA's infancy, the Obama Administration began to issue waivers. First in line were "politically connected businesses," including "restaurants and hip nightclubs in former-Speaker Nancy Pelosi's [congressional] district."[22] Next were members of Congress, who obtained a waiver protecting their staffs from ACA-required health insurance coverage that would have cost each member of Congress and each staffer between $5,000 and $11,000 per year.[23] These early waivers defused a key motivation to reopen Obamacare. *Id.*

As the increase in real costs and less coverage of insurance plans became more widespread, special individual waivers proliferated in number until over 1,200 recipients, ranging from McDonald's to Goodwill Industries, were given temporary waivers in order to

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[22] Z. Evans, "Who Gets an Exemption From Obamacare?" Reason.com (Oct. 1, 2013), http://goo.gl/RJ0JZW.

[23] M. Cannon, "Congress's Obamacare Waiver," National Review Online (Aug. 6, 2013), http://goo.gl/qeVTN1.

avoid having to reduce hours of already economically strapped low-wage workers.[24] "[T]he rul[ings] enabled employers and their workers to keep [for a whole] year the plans they had before the law was passed, even though they didn't meet the new [ACA] minimum standards."[25] In short, "although [ACA] required so-called mini-med insurers to provide guaranteed levels of insurance, [HHS] gave waivers to favored corporations, relieving them of the duty to meet the regulatory and thus also the statutory levels."[26]

"The rest of us must obey the laws"[27] — until further increases in ACA's unpopularity produced an across-the-board waiver for companies with 50 or more full-time employees, delaying that mandate until 2015, after the 2014 midterm elections.[28] Shortly after that, again with an eye on the November 2014 elections, the White House "added a mega-exemption that critics say would allow virtually anybody to skirt" the infamous

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[24] G. Kessler, "Did Obama exempt 1,200 groups, including Congress, from Obamacare?" *The Washington Post* (Oct. 16, 2013), http://goo.gl/SktnP7.

[25] J. Healey, "The real story behind all those Obamacare waivers," *Los Angeles Times* (Oct. 3, 2013), http://goo.gl/Aok9I5.

[26] *See* P. Hamburger, Is Administrative Law Unlawful? at 124 (Univ. of Chi. Press: 2014).

[27] P. Hamburger, "Are Health-Care Waivers Unconstitutional?" National Review Online (Feb. 8, 2011), http://goo.gl/F0xTUh.

[28] *See* "The Legal Limit, Report No. 2," pp. 1-2, by U.S. Senator Ted Cruz, Ranking Member, Senate Judiciary Subcommittee on the Constitution, Civil Rights, and Human Rights.

individual mandate requiring every American to get government-approved health insurance or pay a penalty to the IRS.[29]

As Columbia Law Professor Philip Hamburger has perspicaciously observed:

> When Americans are subject to severe legislation, they can unite to seek its repeal. All persons subject to a harsh law ordinarily must comply with it and will therefore cooperate to fight it. **Waivers**, however, **allow the executive to preserve such legislation by offering relief to the most powerful of those who might demand repeal**, thereby purchasing their nonresistance at the cost of other Americans. Waivers thus shift the cost of objectionable laws from the powerful to others, with the overall effect of entrenching oppressive laws. [Philip Hamburger, Is Administrative Law Unlawful?, p. 127 (Univ. of Chi. Press: 2014) (hereinafter "Hamburger's Unlawful Law") (emphasis added).]

Without a doubt, the Obama Administration has employed "waivers to co-opt political support for [a] politically insupportable law[]." *See id.*

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[29] "Administration adds major exemption for ObamaCare individual mandate," Fox News (Mar. 13, 2014), http://goo.gl/3ogDz1.

Such waivers, Professor Hamburger argues, "revert to a particularly lawless mode of prerogative power[,] [n]ot merely an extralegal lawmaking power, [but] an extralegal power to undo the law without even adopting extralegal legislation." *Id.* The duty imposed on the President by 26 U.S.C. § 36B is decidedly not a discretionary one subject to the President's independent political judgment, but a ministerial one subject to the rule of law. *See, e.g.*, National Treasury Employees Union v. Nixon, 492 F.2d 587 (D.C. Cir. 1974). By dispensing with the section 36B limit on tax credits and subsidies to Exchanges established by the States, the Obama Administration has done exactly what Hamburger contends — unmade the law by an extralegal "legislative" process in violation of the Constitution.

B. The IRS Regulation Violates the Separation of Powers Principle.

The Government would have this Court believe that, by equating a fallback Exchange established by HHS with an Exchange established by a State, the IRS was exercising its ordinary interpretative powers vested in the executive department by Article II, Section 1. *See* Brief for Respondents in Opposition to Petition for Certiorari ("Govt. Opp. Br.") at 8, 10, 13, 17, 18, 24, and 29-31. In support of its position, the Government has touted ACA as a measure with the overriding singular purpose to ensure "affordable (health) insurance to millions of Americans." *Id.* at 13. Thus, the Government insists that any interpretation which interferes with "the Act's stated objective of

ensuring 'near-universal coverage'" must be rejected. *Id.* at 25.

Although the Government contends that this purpose is expressly stated in ACA, at no point in this litigation has the Government produced any specific supporting statutory text. *See, e.g., id.* at 24. Indeed, as pointed out in Petitioners' brief on the merits, even when directly challenged in the rulemaking process to justify its authority, the IRS furnished no textual support for its action; instead, it simply justified its "interpretation" as generally "consistent with the language, purpose, and structure of [26 U.S.C.] section 36B and the [ACA] as a whole." *See* Brief for Petitioners ("Pet. Br.") at 6-7.

However, as Petitioners have argued in their brief, the Government may not ignore the specific text of section 36B, which limits ACA tax credits and subsidies to persons who purchase health insurance through an Exchange established by a State:

> [I]nvoking this amorphous "purpose" to "construe" § 36B to mean the opposite of what it says would not be legitimate interpretation, but wholly lawless revision. [*Id.* at 33.]

Rather, as Petitioners have also demonstrated, by creating "a new 'subsidies-everywhere' purpose," the Government would "defeat the Act's clearly enunciated purpose of encouraging state-established Exchanges." *Id.* Thus, Petitioners contend that the purported IRS "interpretation" of section 36B is "simply a transparent device to rewrite § 36B's plain text":

> to elevate the *Executive's* policy preference (subsidies everywhere) to the detriment of *Congress's* policy of encouraging states to establish Exchanges. Under this lawless reasoning, the IRS could grant § 36B subsidies to those who buy coverage directly from insurers, instead of through an Exchange, in light of Congress's "purpose" to make all coverage affordable through federal subsidies. [*Id.* at 35.]

It is not within the powers vested in the President to formulate by policy through executive action and, then, by that same action to determine the manner in which that policy will be executed. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). To the contrary, Article II, Section 2 of the Constitution vests in the President only the power to execute the law, not to make — much less remake — the law as the IRS has done here. Instead, the power to make the law is vested by Article I, Section 1 of the Constitution in Congress. It is, therefore, for Congress, not the President, to set the nation's health care insurance policy. And Article I, Section 8, Clause 16 vests in Congress — not the President — the power to make all laws that are "necessary and proper" to carry out the policies of Congress. In short, both the objectives, and the means to meet those objectives, belong to the legislative branch, not the executive branch. Youngstown Sheet & Tube at 588.

In setting up the insurance Exchange marketing system, Congress set both the purpose of ACA and the means by which that purpose would be carried out.

The IRS regulation would alter the means chosen by Congress, overriding the statutory means in order to better achieve the Obama Administration's goal of universal health care insurance coverage. To paraphrase Justice Black's opinion in Youngstown, the IRS regulation "does not direct that a congressional policy be executed in a manner prescribed by Congress — it directs that a presidential policy be executed in a manner prescribed by the President." *Id.* at 588. Moreover, by divesting Congress of its authority to determine both the ends and means of a law, the IRS regulation here is the product of the exercise of a prerogative power totally foreign to the American constitutional republic. *See* Hamburger's Unlawful Law at 50.

C. The IRS Regulation Is an Unconstitutional Exercise of Prerogative Power.

According to the Government, in order to save the ACA from total collapse, it was necessary for the IRS to extend tax subsidies and credits to purchasers of health insurance in all Exchanges, those established by the States and those established by HHS. *See* Govt. Opp. Br. at 18-28. Relying in part on the reasoning of the court of appeals below, the Government contends that "'denying tax credits to individuals ... would throw a debilitating wrench into the Act's internal economic machinery' and obstruct the operation of the interdependent reforms through which Congress sought to address the previous failures of the

individual market for insurance." *Id.* at 25.[30] The IRS employed its "interpretive" powers to amend the Act in an effort to right the ACA ship which was about to sink in choppy waters created by the unanticipated decisions of 37 States not to establish their own Exchanges.

Pursuant to the IRS's rulemaking powers, the Government now asserts that "an Exchange established by HHS in a State's stead is, as a matter of law, 'an Exchange established by the State.'" Govt. Opp. Br. at 12. However, as Petitioners point out, this claim "is pure *ipse dixit*; the Act says nothing of the sort." Pet. Br. at 13. While "Congress *could have* deemed HHS Exchanges to be 'established by the State' for subsidy purposes," Petitioners observe, "it never did." *Id.* And, while the Obama Administration could have presented the issue to Congress, it never did. Instead, the Government argues, "necessity required prompt action ... that could not wait for the legislature,"[31] and out of such necessity the IRS by bureaucratic fiat decided that the two kinds of Exchanges were one. This is government by "proclamation," not by the bicameral and presentment process dictated by Article I, Section 7, Clause 2. *See* Hamburger's Unlawful Law at 38-39. It smacks of the

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[30] Although the Government concerns are opaquely stated (*id.* at 25), the Petitioners forthrightly aver that "the IRS Rule triggers ACA mandates and penalties for millions of individuals and thousands of employers in states served by HealthCare.Gov." Pet. Br. at 8-9.

[31] *See* Hamburger's Unlawful Law at 41.

exercise of the "prerogative" powers of law-making and unmaking, which was characteristic of the English Star Chamber (an institution abolished in 1641 (*id.* at 41 and 57)), rather than the tripartite federal government created by the United States Constitution in 1789.

It is simply not for the IRS "to fill the gaps in" in ACA through interpretive law making. *See* Hamburger's Unlawful Law at 51. It is wholly illegitimate for the IRS to proclaim by "faux interpretation" that, as a matter of law, an HHS-established Exchange in a State is the equivalent of a State-established Exchange in that State. By presuming to do so, the IRS arrogated to itself prerogative power characteristic of Roman law, not the English common law. *See id.* at 52-53. Instead of filling in a "gap" in the ACA, the IRS embarked on a mission of its own, a mission comparable to the various efforts chronicled in this brief to rescue the Obama Administration from the increasingly unpopular ACA.

II. JUDGED AGAINST ANY ACCEPTED PRINCIPLE OF STATUTORY CONSTRUCTION, THE GOVERNMENT'S POSITION AND THE POSITIONS OF THE JUDGES BELOW ARE UNSOUND AND SHOULD BE REJECTED.

A. The Statute Clearly Limits Federal Tax Credits to Those Purchasing from Exchanges Created by the States.

Four central provisions of the ACA govern the issue in this case. Each is short and easy to understand:

> 1. "Each **State** shall, not later than January 1, 2014, **establish** an American Health Benefit Exchange ... for the state...." ACA section 1311(b), Petitioner's Brief Addendum ("Pet. Br. Add.") 2A (emphasis added).
>
> 2. "If ... a State is not an electing State ... **the Secretary shall ... establish** and operate such Exchange within the State." ACA section 1321(c), Pet. Br. Add. 31A (emphasis added).
>
> 3. "The premium assistance amount [applies to taxpayers who were] enrolled in through an Exchange **established by the State** under 1311." ACA section 1401(a), Pet. Br. Add. 35A (emphasis added).

> 4. The term "coverage month" applies to a taxpayer "that was enrolled in through an Exchange **established by the State** under section 1311...." ACA section 1401(a), Pet. Br. Add. 42A (emphasis added).

Because the statutory text is so clear, it took considerable ingenuity for each of the judges of the courts below to develop theories to uphold the IRS regulation allowing premium assistance to taxpayers **not** enrolled in an Exchange established by a State — a result directly contrary to the unambiguous statutory text. Upon careful examination, the reasons offered by the courts below are revealed to be little more than cover for dispensing with the statutory text.

B. The District Court Erroneously Elevated Legislative History Over and Against the Statutory Text.

Despite the fact that District Court Judge Spencer acknowledged that "Plaintiffs' plain meaning interpretation ... has a certain common sense appeal" he rejected that meaning solely because it "**lack[ed] any support** in the legislative history." Petition for Certiorari Appendix ("Pet. App.") at 71a (emphasis added). Although Judge Spencer acknowledged that "[t]he legislative history ... is long and complex," he nevertheless concluded "that **Congress did not expect** the states to turn down federal funds [but rather] assumed that tax credits would be available nationwide because every state would set up its own exchange." *Id.* at 70a (emphasis added).

Judge Spencer echoed the only identifiable reason that the IRS presented for its regulation: "the relevant **legislative history does not demonstrate** that Congress intended to limit the premium tax credit to State Exchanges." Pet. App. at 9a (emphasis added). Judge Spencer therefore ruled that "had Congress intended to condition tax subsidies **it would have needed** to provide clear notice." *Id.* at 71a.

However, there is no rule which requires that the "plain meaning" of a statute be supported by legislative history in order to be given effect. It is enough that the statutory language itself is clear, such as it is in this case. *See* Pet. Br. at 18-20. It is through the words of a statute alone that Congress exercises the legislative function. Congress votes only on the words of a statute. Only the words of the statute are law. As Justice Oliver Wendell Holmes explained: "We do not inquire what the legislature meant; we ask only what the statute means."[32] Judge Spencer inverted the Holmes rule and concluded, in essence, that it does not matter what the statute says, if a judge cannot independently validate what the legislature may have meant based upon legislative history, the executive is free to adopt any interpretation it wishes.

Judge Spencer's attempt to impose a new burden on Congress — that it demonstrate in legislative

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[32] Oliver Wendell Holmes, "The Theory of Legal Interpretation" in Collected Legal Papers 203, 207 (Dover Publications: 1920) (cited in Oklahoma v. Burwell, 2014 U.S. Dist. LEXIS 139501 at *15, n.16 (Sept. 30, 2014).)

history that it really meant each provision of every law — constitutes an embarrassingly transparent effort to avoid the "plain meaning" of the text. Harvard Law Professor Laurence Tribe captured the absurdity of elevating legislative history over the statutory text:

> I never cease to be amazed by the arguments of judges ... who proceed as though legal texts were little more than interesting documentary evidence of what some lawgiver had in mind.... [I]t is the *text's* meaning, and not the content of anyone's expectations or intentions, that binds us as law. [Laurence H. Tribe, "Comment," in Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law, 65-66 (Princeton U. Press, 1997).]

C. Section 36B Is Not Ambiguous.

Circuit Court Judges Gregory and Thacker agreed with the district court that "plaintiffs offer[ed] no compelling support in the legislative record for their argument." Pet. App. 24a. But they also recognized that the defendants could not make a convincing case either. Pet. App. 22a. Based on this dearth of legislative history, they concluded "that the applicable statutory language is ambiguous and subject to multiple interpretations." Thus, they upheld the IRS regulation "as a permissible exercise of the agency's discretion." Pet. App. 6a.

Yet, in viewing the actual text apart from the ACA's legislative history, the circuit court below admitted that "there is a certain **sense** to the

plaintiffs' position" as well as "**common-sense** appeal of the plaintiffs' argument; a **literal** reading of the statute undoubtedly accords more closely with their position." Pet. App. 16a, 18a (emphasis added). Further, the court acknowledged that "[i]f Congress did in fact intend to make the tax credits available to consumers on both state and federal Exchanges, it **would have been easy to write in broader language** as it did in other places in the statute." *Id.* at 17a (emphasis added). Nevertheless, ignoring the clear text, the court found "that Congress has not 'directly spoken to the precise question at issue....'" *Id.* at 26a (citations omitted.)

Unless one departs from the principle that the text is paramount, no ambiguity can be found. *See* A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts (Thompson/West: 2012), p. 56. Nevertheless, the circuit court adopted the Government's position that it should give preeminence to the great and historic purposes of the ACA, the signature law of the Obama Administration. The panel stated that "we are **primarily persuaded** by the IRS Rule's advancement of the **broad policy goals** of the Act." Pet. App. 27a (emphasis added).

Likewise, in this Court, the Government again focuses on the law's broad purposes — that the ACA was enacted to increase the number of Americans covered by health insurance and to decrease the costs of health care, and achieving this result required the IRS to issue its regulation in question. Gov't. Br. Opp., p. 2.

Having found ambiguity in the statute, the courts below deferred to the IRS rule, applying step two of the test developed in Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). In doing so, the courts below allowed an administrative agency the latitude to choose to expend billions of dollars of federal money without express Congressional authorization. As Petitioners have argued, a court might "expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'" Util Air Regulatory Grp. v. EPA, 134 S.Ct. 2427, at 2444 (2014) (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000). *See* Pet. Br., p. 52.

The courts below found an ambiguity only by violating the rule of statutory construction which gives supremacy to law's text. As Justice Cardozo explained, "we have not traveled, in our search for the meaning of the lawmakers, beyond the borders of the statute. In aid of the process of construction we are at liberty, if the meaning be uncertain, to have recourse to the legislative history of the measure...." United States v. Great Northern Ry., 267 U.S. 144, 154 (1932). Here, of course, there was no uncertain textual meaning, only uncertain legislative history, and therefore Judge Cardozo's predicate for reliance upon legislative history was not met.

Indeed, in order to ensure the "Supremacy-of-Text-Principle," there are four rules limiting a court's consideration of the purpose of a law, each of which is designed to ensure judicial fidelity to, while minimizing judicial creativity in, applying a legal

text.[33] The courts below shattered all of these limitations. *See* Pet. Br. at 32-33.

First, the courts below failed to derive ACA's purpose from its text. Reading Law at 56. Instead they relied on extrinsic sources, including ACA's sparse legislative history and the IRS self-serving formula to paint a broad and sweeping statement of universal health insurance coverage, while disregarding the text's emphasis upon the role that the States were expected to play in governing their respective insurance markets.

Second, the purpose must be defined "precisely, and not in a manner that smuggles in the answer to the question before the decision-maker." *Id.* at 56. Instead, the Government would have this Court be satisfied with a general reference to the ACA structure, history and purpose, without specifying what that structure and history is, in relation to the relevant text. Such imprecision opens the door "to provide the judge's answer rather than the text's answer as to the "purpose" of the distinction between an Exchange established by the State as contrasted with an Exchange established for a State that has declined to establish one. *Id.*

Third, the purpose must be defined "as concretely as possible, not abstractly." *Id.* at 57. Yet the Government describes the purpose to "increase" the number of Americans covered by health insurance and

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[33] Reading Law at 56-58.

to "decrease" the costs of health care without indicating the practical means prescribed by ACA to accomplish those two goals. Stated so broadly, the lack of concreteness in the stated purpose "effectively" lets the judge decide what the statute should mean.

Finally, in the absence of "an obvious scrivener's error," the courts below have allowed perceived purpose to "contradict text" by "supplement[ing] it." *Id.* at 56-57. The courts below have disregarded the truth that "the limitations of a text — what a text chooses *not* to do [here, granting tax credits to those who sign up with the HHS exchanges] — are as much a part of its 'purpose' as its affirmative dispositions. These ... limitations must be respected, and the only way to accord them their due is to reject the replacement or supplementation of text with purpose." *Id.* at 56-68. The courts below allowed what they believed to be the grand purpose of the law, increasing health insurance coverage, to override other possible other Congressional purposes for section 36B, including providing an incentive to states to establish Exchanges — a requirement that Congress could not constitutionally impose.[34]

D. The IRS Regulation Cannot Be Justified on the Ground of Undesirable Consequences.

The present case is only one of several challenges which have been brought against these same IRS

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[34] *See, e.g.*, Printz v. United States, 521 U.S. 898 (1997). *See* Pet. Br. at 2.

regulations. In Halbig v. Burwell, 758 F.3d 290 (D.C. Cir. 2014) (vacated by Order granting Rehearing *en banc*, 2014 U.S. App. LEXIS 17099), Judges Griffith and Randolph concluded that the IRS Rule is not based on a permissible reading of ACA. They reached this conclusion "with reluctance" due to the "consequences both for the millions of individuals receiving tax credits through federal Exchanges and for health insurance markets more broadly." *Id.* at 412. However, they understood:

> the principle of legislative supremacy ... guides us [and it is] our duty when interpreting a statute is to ascertain the meaning of the words of the statute.... This limited role serves democratic interests by ensuring that policy is made by elected, politically accountable representatives, not by appointed, life-tenured judges. [*Id.*]

Dissenting Circuit Judge Edwards viewed the case not as a legitimate challenge to a set of regulations based on variance with statute, but as a "not-so-veiled attempt to gut" the ACA. To thwart that perceived attempt, Judge Edwards realized that the text was not his friend. But he also knew that "the more the interpretive process strays outside a law's text, the greater the interpreter's discretion."[35] Hence, Judge Edwards insisted that the "words of a statute must be read in their context" and interpreted as to uphold the IRS Regulation, because otherwise "[i]mplausible

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[35] *See* Reading Law at xxii.

results would follow." Halbig at 427. In focusing on what he viewed to be the undesirable consequences of following the statutory text, Judge Edwards dabbled in the flawed interpretative approach of "consequentialism," urging that the ACA be interpreted to achieve the results he believes to be sensible and desirable. This is a dangerous judicial technique, for:

> it is precisely because people differ over what is sensible and what is desirable that we elect those who will write our laws — and expect courts to observe what has been written. There is an uncanny correspondence between the consequentialist's own policy views and his judicial decisions. [Reading Law at 22.]

Indeed, both courts below focused on how the statute should have been written rather than on how it was written.

In upholding one of the other challenges to the IRS regulation, District Judge Ronald A. White warned of the impropriety of a court "'helping' one side or the other" in litigation before it. Oklahoma v. Burwell, 2014 U.S. Dist. LEXIS 139501, *24 (Sept. 30, 2014). "This is a case of statutory interpretation. 'The text is what it is, no matter which side benefits.'" *Id.* (citation omitted). Moreover, referring to D.C. Circuit Judge Edward's characterization of Petitioners' motive in Halbig, Judge White added:

> [s]uch a case ... does not "gut" or "destroy" anything. On the contrary, the court is

> upholding the Act as written. **Congress is free to amend the ACA to provide for tax credits** in both state and **federal exchanges**, if that is the legislative will. [*Id.* at *24-25 (emphasis added).]

E. The Sea Change in Congress since Passage of the ACA Must Not Drive this Court's Decision.

Judge White is right — Congress could amend the ACA to legitimize the IRS regulation. However, left unstated by Judge White is what could be viewed as the elephant in the room — the political backdrop to this litigation: that is, despite Congress' awareness of the textual issue raised in this litigation, it has not acted to moot this litigation by conforming the statutory text to the IRS regulation.[36] It is for this political reason that the Government has resorted to a regulatory fix, and now asks this Court to avert its eyes to the Government's textually unfettered reading of the statute and the usurpation of legislative authority inherent in the Government's approach.[37]

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[36] *See, e.g.*, M. Cannon and J. Adler, "The Illegal IRS Rule to Increase Taxes & Spending under ObamaCare," Testimony before Committee on Oversight and Reform, U.S. House of Representatives (Aug. 2, 2012). http://www.cato.org/publications/congressional-testimony/illegal-irs-rule-increase-taxes-spending-under-obamacare-1.

[37] The reputation of the IRS as a nonpartisan entity has suffered greatly from exposure of its targeting of certain categories of applicants for tax-exempt status. *See generally*, Staff Report, Committee on Oversight and Government Reform, U.S. House of

The stakes in this litigation are so high precisely because the President and the Justice Department recognize that Congress passed the 2010 law that the President requested, but Congress now will not amend the ACA as the President would want in 2015. ACA passed the Senate by a strictly partisan vote of 60 Democrat Senators[38] to 39 Republican Senators (with one Republican not voting).[39] ACA passed the House of Representatives with only Democrat support by a vote of 219 to 212 (the "no" vote consisting of 178 Republicans and 34 Democrats).[40] Since then, three federal elections have ensued, with the Democratic Party losing control of both the Senate and House[41]:

Representatives, Lois Lerner's Involvement in the IRS Targeting of Tax Exempt Organizations (Mar. 11, 2014). http://oversight.house.gov/wp-content/uploads/2014/03/Lerner-Report1.pdf.

[38] For purposes of this analysis, independent members of Congress (Senator Bernard Sanders and Senator Angus King) are counted with the Democrat party with which they caucus.

[39] http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=111&session=1&vote=00396.

[40] http://clerk.house.gov/evs/2010/roll165.xml.

[41] In each case, party composition at the beginning of each Congress is used.

Party Composition of U.S. Congress
(111th - 114th Congress)

November Election	Congress	Democrats	Republicans
U.S. Senate			
2008	111th	**58**[42]	41
2010	112th	**53**	47
2012	113th	**55**	45
2014	114th	46	**54**
U.S. House of Representatives			
2008	111th	**256**	178
2010	112th	193	**242**
2012	113th	200	**233**
2014	114th	188	**247**

As the American people have voted in federal elections since ACA was enacted in March 2010, a great many of the supporters of the ACA are no longer serving in Congress. Moreover, the Republican Party, which provided not one vote in either house to enact the ACA, has achieved dominant positions in both chambers.[43] The obvious political reality of this shift in political winds is that the Obama Administration

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[42] Note: bolding indicates the party in control of each branch of Congress.

[43] P. Klein, "Half of the Senators who voted for Obamacare won't be part of new Senate," *Washington Examiner*, (Dec. 6, 2014). (Congressional passage of the ACA "trigger[ed] a massive backlash that propelled Republicans to control of the House the following year. On the Senate side ... half of the Senators who voted for Obamacare will not be part of the new Senate.")

cannot rely on Congress to remedy the problem with the ACA, and for this reason has attempted to use regulation as a substitute for legislation.

However, the rules of statutory construction cannot be adjusted to fix problems created by elections, no matter how much one might otherwise want. For example, in his concurrence in the Fourth Circuit below, Judge Davis deferred to the Government's position asserting that "Congress has mandated ... tax credits to all consumers" regardless of who established the exchange. Pet. App. at 34a. Judge Davis stated that the basis for his conclusion was "a simple reason: '[E]stablished by the State' indeed means established by the state — except when it does not...." Pet. App. at 36a.[44] Indeed, in Oklahoma v. Burwell, District Judge White analogized the Government's creative argument to Sundance Assocs., Inc. v. Reno, 139 F.3d 804, 807 (10th Cir. 1996), where the Tenth Circuit rejected a Government assertion that an "evident exception in [the Child Protection and Obscenity Enforcement Act of 1988] statute was actually intended to broaden the statute's scope" as an exercise that "leads us down a path toward Alice's Wonderland, where up is down and down is up and words mean anything." Oklahoma v. Burwell, at *16; Sundance Assocs. at 808.

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[44] Judge Davis' "simple reason" brings to mind Justice Rehnquist's critique that "[t]he reasoning which leads to this conclusion would appeal only to a lawyer...." Francis v. Franklin, 471 U.S. 307, 338 (1985) (Rehnquist, J., dissenting).

The analogy to Alice's world deserves amplification, by reviewing Lewis Carroll's telling of a conversation between Humpty Dumpty and Alice:

> "I don't know what you mean by 'glory,'" Alice said. Humpty Dumpty smiled contemptuously. "Of course you don't—till I tell you. I meant 'there's a nice knock-down argument for you!'" "But 'glory' doesn't mean 'a nice knock-down argument'," Alice objected. "When *I* use a word," Humpty Dumpty said in rather a scornful tone, "it means just what I choose it to mean—neither more nor less." "The question is," said Alice, "whether you CAN make words mean so many different things." "The question is," said Humpty Dumpty, "which is to be master—that's all."[45]

Faced with an unambiguous statute, the Government urges this Court to become the master of words by investing a statutory text with a meaning completely contrary to its plain meaning. This exercise is being pursued not based on established rules of statutory construction, but for an extra-legal reason best understood as Realpolitik. That, this Court cannot countenance.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed.

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[45] Lewis Carroll, Through the Looking Glass (1871).

Respectfully submitted,

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